**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO.735 OF 1989**

The State of Maharashtra, .. Appellant
Vs
1. Raju Ramdas Shahu,
age 23, r/o Sahakar Nagar, Thane,

2. Ashok Shankar Labhake,
age 21, r/o Lokmanya Nagar,
Pada No.1, Thane.

3. Vasant Savalaram Labhade,
age 26, r/o Lokmanya Nagar,
Pada No.1, Thane.

4. Ramchandra Piraji Yadav,
age 26, r/o Sahakar Nagar, Thane,

5. Vijay Sundar Shetty,
age 20 , r/o Sahakar Nagar,
Thane.

6. Sundar Padma Pujari,
Age 25, r/o Vartak Nagar, Thane. Respondents
Accused.

ALONG WITH

**CRIMINAL APPEAL NO.737 OF 1989**

The State of Maharashtra, .. Appellant
Vs
1. Kishor Shankar Labhade
r/o Lokmanya Nagar, Pada no.1,
Thane. .. Respondent

Mr P.S.Hingorani, APP for the Appellant-State.
Mr C.R.Sonawane, for the respondents (Absent).

**CORAM : Smt.Ranjana Desai &**
**D.B.Bhosale, JJ.**

**DATE : 7th July, 2005.**

**JUDGEMENT : (Per D.B.Bhosale, J.)**

1. These Appeals are directed against a common Judgment and order dated 26.7.1989 rendered by the

learned Vth Addl.Sessions Judge, Thane in Sessions Case Nos. 641/87, 142/88 and 328/88, by which all the eight accused involved in all the three Sessions Cases have been acquitted. The accused persons were charged and tried for the offences punishable under sections 147,148,149,302 and 323 of IPC. The alleged incident occurred on 19.9.1987 at about 11 pm at Shashtri Nagar, within the jurisdiction of Vartak Nagar Police Station, Thane. All the accused persons along with the absconded accused allegedly formed an unlawful assembly and in further of their common intention committed murder of Bharat Sadashiv Koli and caused hurt to Yeshwant Gagaram Koli. Alternatively, they were also charged for the offences punishable under sections 302 and 323 read with 34 of IPC.

2. The prosecution case unfolded from the evidence, briefly stated, is that on the eve of Ganesh immersion procession, there was a quarrel between the accused persons, who were drunk at the relevant time, and deceased Bharat Sadashiv Koli. In that incident, deceased-Bharat was threatened by the accused persons. There was also a scuffle between him and Raju - accused no.1 in the evening of 18.9.1987. The said bickering resulted in the

alleged occurrence that took place at 11 pm on 19.9.1987 when the deceased was standing in front of the mutton shop at Shashtri Nagar along with his friend Yashwant Kadam (PW 1). At that time, a group of 20-25 persons including the respondents-accused came there with deadly weapons, like iron bar, pipe, axe, chain etc and they assaulted deceased Bharat. Sunder Pujari -accused no.6 allegedly assaulted Yeshwant Kadam with an iron rod. Yeshwant Kadam somehow managed to flee from the scene of offence. On getting information of the assault on Bharat, his brother Rajesh (PW 6) rushed to the scene of offence when he found Bharat lying in an injured condition. On the instructions of Bharat he immediately proceeded to Vartak Nagar Police Station and within short time returned with constables Sonawane and Gangurde, who met him on his way to the police station. They all took Bharat to the police station and therefrom to the Civil Hospital, Thane. Dr.Rode got Bharat admitted in the hospital at about 11.55 pm. PSI Choudhari reached the civil hospital within short time and recorded a statement of Bharat vide Exhibit-24. The statement of Bharat was treated as FIR and in pursuance thereof an offence, bearing no. I-159/87 under sections 147, 148,149 and 307 of IPC, came to be registered at 1.35 am on 20.9.1987. The

investigation of the crime was thereafter taken over by PSI Karhad. He set the investigation in motion. He requisitioned Special Executive Magistrate Mr Kulkarni for recording dying declaration of Bharat. A dying declaration of Bharat was accordingly recorded by Mr Kulkarni vide Exhibit-34. Thereafter, on 21.9.1987 Bharat succumbed to injuries. The Investigating Officer Karad thereafter converted the offence from 307 to 302 IPC and carried further investigation and submitted the chargesheet against accused nos 1 to 6. On 21.1.1988 accused Kishor Labhade came to be arrested and against him the chargesheet was submitted on 13.2.1988. Accused Kamlakar came to be arrested on 28.6.1988 and after completing the investigation against him, the chargesheet came to be submitted against him also. The defence propounded by the accused persons was of total denial. They have denied the incident dated 18.9.1987, which took place during Ganesh immersion procession. It is their case that they have been falsely implicated in the alleged incident due to enmity between PSI Choudhari and Labhade family.

3. To bring home the guilt of the accused persons, the prosecution examined as many as 16 witnesses. The prosecution case rests on the ocular

account of eye-witnesses, dying declarations of Bharat and the circumstantial evidence consisting of motive, recovery of weapons, etc. At the outset, let us record that the learned APP fairly stated that none of the eye-witnesses including Yeshwant Kadam (PW 1), friend of deceased Bharat and Rajesh, younger brother of the deceased, who allegedly had witnessed the incident, supported the prosecution. He further submitted that in so far as panchanamas drawn by the prosecution, including recovery of the weapons, are concerned, in all the panchanamas same persons acted as panchas and they also did not support the prosecution at all. The eye-witnesses as well as the panch witnesses were declared hostile and their evidence is of no use to the prosecution.

4. We examined the testimonies of the eye-witnesses as also of the panchas and found substance in the submission of the learned counsel. Not only that the eye-witnesses and panchas turned hostile but their evidence do not support the prosecution in any manner whatsoever and, therefore, the only piece of evidence on which the learned APP strongly relied upon was the two dying declarations of deceased Bharat. We perused the judgment of the trial Court. The trial Court has discussed the

evidence of Yashwant Kadam (PW 1) and the evidence of Rajesh (PW 6) in paragraphs 12 and 13 of the judgment. The trial Court has concluded the discussion on the testimonies of these eye-witnesses observing that both had not seen the occurrence and their evidence is not worthy of credence and that they are not reliable. In so far as the assault by accused no.6 on Yeshwant Kadam (PW 1) is concerned, the learned trial Judge has observed that there is no evidence to show that Yeshwant Kadam was present at the time of actual assault and accused no.6 assaulted him. Even the medical evidence does not support the allegation that Yeshwant Kadam sustained any injury in the alleged occurrence. The evidence of Sonawane (PW 4) also is of no use to the prosecution since he does not state anything about the actual assault, nor does he claim that he asked Bharat as to who assaulted him and/or has disclosed the names of the assailants. The panch witnesses have not supported the prosecution at all and even if it is assumed that the discovery of the weapons stands proved, that would not be of any help or support to the prosecution inasmuch as the substantive evidence of the eye-witness is not worthy of credence and on the basis thereof it does not point to the guilt of the accused beyond reasonable doubt.

5. We would now like to consider the evidence of the dying declarations. We are conscious of the settled position in law that a conviction could be solely based upon a dying declaration provided the dying declaration is free from infirmities and it is found to be voluntary, truthful and acceptable. What evidentiary value or weight has to be attached to such statement necessarily depends upon the facts and circumstances of each particular case. The first dying declaration (Exhibit-24) was recorded by PSI Choudhari. We perused the said dying declaration. The deceased had stated that on 19.9.1987 at 11 pm while he was with his friend, Yeshwant Kadam, standing in front of Mutton shop at Shashtri Nagar, Ashok Labhade, Raju Shahu and Vasant Labhade came there along with 20-25 friends and all of them were armed with deadly weapons like iron bar, sword, chain etc. He further stated that all of them attacked him and his friend Yeshwant Kadam. Neither he attributed specific overt acts to any of the accused persons, nor did he say what weapons they all were armed with at the relevant time. Learned APP vehemently submitted that the dying declarations recorded by PSI Choudhari and even by Special Executive Magistrate Kulkarni do not suffer from infirmity and, therefore,

they are sufficient to prove the accused persons guilty. We found it impossible to accept the submission of the learned APP particularly in view of the fact that the dying declaration is absolutely vague and that none of the eye-witnesses have supported the prosecution. Even the evidence of recovery of the weapons does not support the prosecution. Further, even if we assume that the dying declaration recorded by PSI Choudhari suffers from no infirmities, it would not help the prosecution to bring home the guilt of the accused, since it is absolutely vague and no specific overt acts had been attributed to any of the accused persons involved in this case. It appears that there were 20-25 persons and they all attacked the deceased. Who were the authors of the injuries suffered by the deceased is not clear. Eight injuries were sustained by the deceased. Out of them only one injury was of a sharp weapon. All other injuries were C.L.Ws. and abrasions as stated by Dr Rode (PW 9). Moreover, the learned trial Judge has discarded the first dying declaration not only on the ground that it was vague and it did not specify the role played by each of the accused in paragraph 20 of the judgment, it was observed that the first dying declaration was recorded between 12.30 and 1 am,

however, PW 14 Dr Kempti Patil has stated that he did not remember whether the police officer or the Special Executive Magistrate Mr Kulkarni had approached him to know the condition of the patient. The learned trial Judge on the basis of the medical papers produced on record and the testimonies of the doctors recorded a positive finding that from the physical condition of the patient it was not possible for the patient to give statement between 0.35 hours and 3 am on 28.9.1987. The dying declaration recorded by Mr Kulkarni, Special Executive Magistrate, also does not take the prosecution case further. The statement (Exhbit-34) recorded by this witness is more vague than the one recorded by the investigating officer. In this statement, the deceased had stated that Raju Shahu came with his 15-20 boys and assaulted him with sword, knife, angle etc. Accused Vasant Labhade and Ashok Labhade were amongst those persons. He further states that he was man-handled by those persons and they assaulted him with the weapons they possessed at the relevant time. According to the deceased, all the persons were drunk at the relevant time. Considering the opinion expressed by the doctor and the discrepancies observed by the learned trial Judge who recorded a positive finding that it was not probable for the

deceased to make a dying declaration, we find it impossible to interfere with that finding in this appeal against acquittal. The learned trial Judge has also expressed a doubt about the deceased being influenced by the relatives who were present in the ward. The Executive Magistrate in his testimony has stated that the relatives of the deceased were present in the ward and they also had a dialogue with him. Considering the entire material placed by the prosecution, the trial Court found it difficult to hold that the dying declarations were voluntary and without any influence and prejudice and in any case they have not been corroborated by the other evidence and, therefore, conviction cannot rest on such dying declarations. The trial Court arrived at these findings independent of the infirmities found in the dying declarations, such as no signature of the deceased was obtained on the dying declaration. Signature or thumb mark of the patient was not obtained on the dying declarations. On the basis of the Doctor’s evidence the learned trial Judge found that the deceased was not in a fit state of mind to give a statement either to the investigating officer or to the Special Executive Magistrate. We find absolutely no reason to interfere with the findings recorded by the learned trial Judge based on the

appreciation of evidence on record. The appreciation of evidence by the trial Court and the conclusions arrived at cannot be stated to be perverse. In other words, it cannot be stated that the view taken by the trial Court is impermissible from the evidence on record and if the order of acquittal is allowed to stand it will result in miscarriage of justice. The law is settled by the Apex Court in several judgments including the judgments reported in AIR 1987 SC 1083, AIR 1988 SC 1158 and AIR 1990 SC 2134 etc. The conclusions of the trial Court drawn on the evidence on record, in our opinion, are reasonable and in any case cannot be termed as perverse or unsustainable. On reappraisal of the evidence we found that the view taken by the trial Court was plausible one and needs no interference in this appeal against the order of acquittal.

6. In the result, these appeals are dismissed. We hereby confirm the acquittal. Bail bonds, if any, executed under section 390 Cr.P.C, stand cancelled.

**(D.B.Bhosale, J.)** **(Smt Ranjana Desai, J.)**

:12:

**HIGH COURT**
**CRIMINAL APPELLATE SIDE**

CRIMINAL APPEAL NO.735 OF 1989
ALONG WITH
CRIMINAL APPEAL NO.737 OF 1989
(State of Maharashtra Vs. Raju Shahu and ors)

**Date of Judgment:**

7th July, 2005.

**For approval and signature**

**THE HON'BLE SMT.JUSTICE RANJANA DESAI.**

**THE HON'BLE MR.JUSTICE D.B.BHOSALE.**

1. Whether Reporters of Local Papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the Judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any Order made thereunder?

5. Whether it is to be circulated to the Civil Judges?

6. Whether the case involves an important question of law and whether a copy of

the judgment should be sent to Nagpur Aurangabad or Goa offices?

FARAD CONTINUATION SHEET NO.:

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE

CRIMINAL APPEAL NO.735 OF 1989
ALONG WITH
CRIMINAL APPEAL NO.737 OF 1989
(State of Mah Vs. Raju Shahu and ors)

**Date of Judgment:**

7th July, 2005.

| Office Notes, Office Memoranda of coram, appearances, Court's orders or directions and Registrar's orders. | Court's or Judge's orders. |
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Mr P.S.Hingorani, APP for the Appellant.
Mr. C.R.Sonawane, for the respondents(absent)

CORAM: Smt Ranjana Desai &
D.B.Bhosale, JJ.

DATED: 7th July, 2005.

**P.C.**:

For the reasons to be recorded separately in the accompanying judgment, the Court dismisses these appeals and confirm the order of acquittal. Bail bonds, if any, executed under section 390 Cr.P.C, stand cancelled.

Dt: 12.7.05 For Registrar